Supreme Court, U.S.
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No. 10-5

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In The

Supreme Court of the United States

SALIH HOT, VALJBONA HOT,

Petitioners,

v.

ERIC H. HOLDER, ATTORNEY GENERAL,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Third Circuit's refusal to consider Petitioner's cognizable due process claim solely because it was presented in the context of a motion to reopen conflicts with the Second Circuit's precedent which recognizes an alien's due process interest in not being returned to a country where he fears persecution.

Whether aliens who have established ineffective assistance of counsel may assert a due process violation in the context of a motion to reopen, when motions to reopen are considered discretionary relief without a liberty interest at stake.

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OPINIONS BELOW

The decision of the Court of Appeals is not officially reported, and appears in the Appendix to this Petition at App. 1. The decisions of the Board of Immigration Appeals ("BIA") and the Immigration Judge ("IJ") are not officially reported, and appear in Appendix A to this Petition at App. 8 and App. 12, respectively.

JURISDICTION

The judgment of the Court of Appeals was entered on April 12, 2010. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. §1253(h)

The Attorney General is prohibited from deporting or returning an alien to a country in which his life or freedom would be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. §1362

Aliens in removal proceedings have a statutory right to be represented by counsel at their own expense.

8 C.F.R. §1003.23(b)

These regulations provide the applicable requirements for motions to reopen, as the Immigration and Nationality Act does not provide a statutory mechanism for motions to reopen.

8 C.F.R. §1003.1(d)(3)(ii)

On appeal, the Board of Immigration Appeals reviews a motion to reopen presented to an Immigration Judge *de novo.*

PRELIMINARY STATEMENT

The Third Circuit's precedent which finds that no due process claim exists in the context of discretionary forms of relief or motions to reopen conflicts with the Second Circuit's precedent which recognizes an alien's due process interest in not being returned to a country where he fears persecution.

Also at issue in this case is the constitutional right of aliens in removal proceedings to be represented by competent counsel. The decision below, which held that the Petitioners did not have a cognizable due process claim because there is no liberty interest at stake in a motion to reopen immigration proceedings, fundamentally contradicts controlling precedent law regarding the ability of

aliens to reopen their proceedings based on having been a victim of ineffective assistance of counsel.

STATEMENT OF THE CASE

A. The Petitioners' Background

Petitioners Salih and Valjbona Hot, husband and wife, ("Petitioner," and/or "Petitioners" and/or "Mr. and Mrs. Hot") are natives and citizens of the former Yugoslavia. After entering the U.S. approximately twenty (20) years ago, the Petitioners filed an administrative application for asylum in 1991. They were interviewed in 1995, and their application was thereafter referred to the Executive Office for Immigration Review ("EOIR") by service of an Order to Show Cause on December 14, 1995. The Petitioners have three U.S. citizen children, now ages 18, 16, and 10 years old. The Petitioners and their children all currently reside in the U.S.

B. Administrative Proceedings

Proceedings commenced on March 21, 1996. Petitioners were first represented by an individual who failed to appear on their behalf on two occasions. As a result, Mr. and Mrs. Hot retained Andrew Bayne, Esq. to represent them before the EOIR. On April 31 [sic], 1996, Mr. Bayne submitted amended applications for asylum to the IJ. However, prior to the completion of their proceedings, Mr. Bayne relocated to Florida, and therefore notified the

Petitioners that he could no longer represent them. He referred them to Edward Shulman, Esq.

On July 31, 1996, Mr. Shulman appeared before the IJ on behalf of the Petitioners. On that date, he stipulated with the government to withdraw the Petitioners' applications for asylum and withholding of removal. He then accepted an order of voluntary departure on behalf of the Petitioners. At the conclusion of proceedings, the IJ granted voluntary departure.

After retaining undersigned counsel, on or about December 6, 2007, a Motion to Reopen based on ineffective assistance of counsel was filed with the IJ.[1] In compliance with *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988). The motion to reopen included a declaration from Mr. Hot; copies of complaints against Mr. Shulman, Esq. and Mr. Sirota, Esq. which were made to the appropriate disciplinary committees; and a detailed declaration from undersigned counsel, which explained the ineffective conduct of prior counsel, and the due diligence of the Petitioners. Substantial evidence demonstrating the good moral character of the Petitioners and their substantial ties to the United States was also attached to the motion

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[1] Petitioners first filed a motion to reopen on or about September 24, 2007, after being detained by Immigration and Customs Enforcement. IJ Frederic G. Leeds denied the Petitioner's motion to reopen, finding that the requirements of *Lozada*, 19 I. & N. Dec. 637 (BIA 1988), were not met. This decision is not included herewith.

to reopen. On January 15, 2008, IJ Leeds denied the Motion to Reopen. A timely appeal followed.

Petitioners appealed the decision of the IJ and on or about July 20, 2009, the BIA dismissed Petitioners' appeal. App. 12.

C. The Court of Appeals Decision

A timely Petition for Review to the U.S. Court of Appeals for the Third Circuit followed. On April 12, 2010, the Court issued an opinion, denying the Petition for Review. App. 1. The Court found that the BIA had not abused its discretion in denying the motion to reopen. Essentially, the Court agreed that the Hots did not establish due diligence, and thus were not entitled to equitable tolling of the filing deadline for their motion to reopen, despite having satisfied the requirements of *Lozada*, 19 I. & N. Dec. at 637. App. 6. The Court further found that the Petitioners "do not have a cognizable due process claim because there is no liberty interest at stake in a motion to reopen immigration proceedings, a discretionary form of relief. *Altamirano-Lopez v. Gonzales*, 435 F.3d 547, 550-51 (5th Cir. 2006). *See also U.S. v. Torres*, 383 F.3d 92, 104-05 (3d Cir. 2004)." App. 6.

REASON FOR GRANTING THE WRIT

Certiorari should be granted because the decision below conflicts with this Court's precedent on evaluating ineffective assistance of counsel in the context of an alien's right to be represented by competent counsel, and also because it reveals a split among the circuits. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 926 (1982) (certiorari granted where opinion below "appears to be inconsistent with prior decisions of this Court."); Supreme Court Rule 10 (conflict among the circuits is a basis for certiorari). In their decision, the Third Circuit never evaluated the merits of Petitioners' due process claim. In so doing, the Court determined that because a motion to reopen is considered a discretionary form of relief, the Petitioners did not have a due process claim to assert. App. 6-7.

A. A Circuit Split Exists

The Third Circuit decision conflicts with controlling precedent in the Second Circuit. In the Second Circuit case *Augustin v. Sava*, 735 F.2d 32 (2d Cir. 1984), the Court held that procedural protections afforded aliens apply to hearings on applications for political asylum, even though a *grant* of asylum is discretionary. *Id.* at 37. In so holding, the Court recognized that "Congress clearly intended to 'grant aliens the right to submit and the opportunity to substantiate their claim for asylum.'" *Id.* (Internal citations omitted). Furthermore, because the Immigration

and Nationality Act prohibits the Attorney General from deporting or returning an alien to a country in which his life or freedom would be jeopardized, a "substantial entitlement to relief" was created, and Fifth Amendment due process protections apply. *Id.* at 37. *See also Chun v. Sava*, 708 F.2d 869 (2d Cir. 1983). Particularly relevant to the instant case, *Augustin* found,

> *The requirements of the due process clause are flexible and dependent on the circumstances of the particular situation examined. Without attempting to map precisely the contours of due process in the immigration area, we think that the protected right to avoid deportation or return to a country where the alien will be persecuted warrants a hearing where the likelihood of persecution can be fairly evaluated.*

Id. at 37; *see also Yeun Jin v. Mukasey*, 538 F.3d 143, 157 (2d Cir. 2008). These protections which are clearly recognized in the Second Circuit, are essentially ignored in the Third Circuit. By holding that an alien does not have a cognizable due process claim because there is no liberty interest at stake in a motion to reopen immigration proceedings, a discretionary form of relief, the Third Circuit shuts off a line of inquiry which reveals the due process violation. Mr. and Mrs. Hot never had the merits of their application for asylum considered by the Court, because of the ineffective assistance of their former counsel, which was clearly established through their motion to reopen. The Third Circuit is essentially

holding that no matter how egregious a due process violation has occurred in proceedings below, an alien will be denied review of that claim when it is presented in the form of a Motion to Reopen. To do so conflicts with the very protections which the Constitution affords an alien in removal proceedings, as outlined in the Second Circuit precedent cited above. In the context of an underlying application for asylum, as is the case here, it further conflicts with the statutory obligation of the Attorney General to refrain from removing an alien to a country where he fears persecution.

In sum, the Circuit split which exists threatens to create a vast disparity in the treatment of aliens facing removal, and specifically, who have been victims of ineffective assistance of counsel. The Third Circuit's holding completely deprives an alien any venue to challenge their denial of due process when they have been unable to pursue their claims for relief.

B. Unremedied Ineffective Assistance of Counsel Inherently Violates Due Process

The filing of a motion to reopen is the sole remedy available to aliens who are subject to an order of removal or deportation, and have been victims of ineffective assistance of counsel. As such, it is the only manner in which an aggrieved alien may challenge an ineffective attorney's conduct, which has led them to be subject to an order of removal or

deportation. To deprive an alien of his right to challenge such conduct is by itself a violation of due process, which was not considered by the Court. Furthermore, the case law relied on by the Court in reaching their decision, differs from the case herein. The Petitioners in *Altamirano-Lopez* and *Torres* were asserting due process violations on other grounds, whereas here, Petitioners' due process violation was centered not only in the BIA and the IJ's failure to properly consider the evidence of record, but the independent due process violation in receiving ineffective assistance of counsel during their initial removal proceedings. *See Altamirano-Lopez*, 435 F.3d at 550-51. *See also United States v. Torres*, 383 F.3d at 104-05.

When ineffective assistance of counsel is demonstrated, the time limitations for motions to reopen set forth at 8 C.F.R. §1003.23(b) may be equitably tolled. *Borges v. Gonzales*, 402 F.3d 398, 407 (3d Cir. 2005); *Iavorski v. INS*, 232 F.3d 124, 133 (2d Cir. 2000) (concluding that there can be tolling because there is "no evidence that Congress intended to enact a jurisdictional bar to untimely motions to reopen"). Equitable tolling applies "as a matter of fairness where a [party] has been prevented in some extraordinary way from exercising his rights." *Id.* at 129 (*quoting Johnson v. Nyack Hosp.*, 86 F.3d 8, 12 (2d Cir. 1996)). Since claims of ineffective assistance of counsel "satisfy the general requirement that motions to reopen present 'new facts' that are 'material and [were] not available and could not have

been discovered or presented at the former hearing,'" filing deadlines for these motions may be subject to an equitable tolling. *Id.* (*citing*, 8 C.F.R. §3.23(b)(3) (2000) (recodified at 8 C.F.R. §1003.23(b)(3) (2003))); *Cekic v. INS*, 435 F.3d 167, 170 (2d Cir. 2006).

In their July 20, 2009, decision, the BIA erred in denying the Petitioners' appeal despite the fact that the requirements set forth in *Lozada*, 19 I. & N. Dec. at 637, were clearly met in their motion to reopen filed with the IJ. *See Matter of Compean*, 25 I. & N. Dec. 1 (BIA 2009). In this case, the BIA improperly dismissed the evidence presented, which clearly and overwhelmingly demonstrated the ineffective assistance of Mr. Sirota, Esq. and Mr. Shulman, Esq. *See Reyes v. INS*, 673 F.2d 1087, 1089 (9th Cir. 1982) (the BIA's denial of the motion to reopen is arbitrary and an abuse of discretion when it distorts or disregards important aspects of the alien's claim). Mr. and Mrs. Hot had complied with all of the requirements of *Lozada*: they submitted a detailed affidavit, as well as copies of the detailed complaints which were filed with the appropriate disciplinary committees. Both of their prior attorneys were informed and served with copies of the complaints and the motion. In their decision, the BIA found Petitioners' argument challenging the IJ's determination that Petitioners failed to demonstrate due diligence to be "unpersuasive." App. 9. However, as explained in the brief on appeal to the BIA, the declaration submitted by Mr. Hot in support of the motion to reopen expressly detailed how the conduct of both of his former attorneys

prevented him from effectively pursuing his case. Furthermore, Mr. Hot's declaration clearly explained why they were unable to file a motion to reopen at an earlier time. The fact that Mr. Shulman accepted an Order of Voluntary Departure, and withdrew the Petitioners' application for asylum is a drastic and significant change in case strategy, which should have been discussed in detail with Mr. and Mrs. Hot, and should have been agreed to by them. In essence, what Mr. Shulman did was agree that the Petitioners would return to their home country voluntarily, even though they were afraid to do so, and had a well-founded fear of persecution. They had no other relief available to them and never would have agreed to return voluntarily to Yugoslavia, and acceptance of voluntary departure was contrary to their request for asylum. Mr. Shulman basically coerced the Petitioners into this predicament.

In *Rranci v. Attorney General*, 540 F.3d 165 (3d Cir. 2009), the Court of Appeals for the Third Circuit found that the possibility that the alien's former counsel provided ineffective assistance in asylum proceedings was strong enough to warrant remand. Similar to the instant case, in *Rranci*, evidence showed that "counsel confused his client by abruptly switching strategies and recommending that alien ask for voluntary departure, and that recommendation may have been erroneous given the peril alien appeared to face in his home country." *Id.* As documented in the motion to reopen herein, Mr. and Mrs. Hot were led to believe they were pursuing their

applications for asylum before the IJ. The attorney they hired, Mr. Andrew Bayne, Esq., submitted amended asylum applications to the IJ, approximately three (3) months prior to Mr. Shulman withdrawing the same applications. As discussed in the motion to reopen, Mr. Shulman took over Mr. Bayne's representation of the Petitioners due to the fact that Mr. Bayne moved to Florida, and asserted that he could no longer represent the Petitioners. After meeting his new clients on only one or two occasions, Mr. Shulman withdrew their applications for asylum, and accepted voluntary departure on their behalf. As explained in their motion to reopen, the Petitioners were led to believe that this was their only option, and that not accepting voluntary departure would result in their immediate arrest and deportation. Unfortunately, Petitioners relied completely on Mr. Shulman's "advice" as they had very little knowledge of the English language at the time, and did not understand their options. *Id.*

To establish their due diligence, the motion to reopen also expressly detailed what the Petitioners did after their voluntary departure order was issued, which included consulting with several other immigration attorneys. In the year 2000, Mrs. Hot was suffering from serious health problems, and was diagnosed with Bell's Palsy. This further exacerbated the Petitioners' inability to seek out competent counsel, and attempt to legalize their status in the U.S. Essentially, though eleven years had passed since their order of voluntary departure, the

Petitioners' motion was filed at the earliest date following their discovery of the ineffective assistance of counsel.

Despite having demonstrated that the BIA's decision was not supported by substantial evidence, the Third Circuit nonetheless dismissed Petitioners' petition for review, and refused to review the merits of Petitioners' due process arguments. *Abdulrahman v. Ashcroft*, 330 F.3d 587, 595 (3d Cir. 2003) (the Court reviews claims of due process violations in deportation proceedings *de novo*). It is well established that aliens in the U.S. are entitled to full due process of law. *Plyler v. Doe*, 457 U.S. 202, 215 (1982); *Bridges v. Wixon*, 326 U.S. 135, 152 (1945); *Burger v. Gonzales*, 498 F.3d 131, 134 (2d Cir. 2007). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). Due process applies in deportation proceedings both before the IJ and the BIA. *See, e.g., Bridges*, 326 U.S. at 135; *Larita-Martinez v. INS*, 220 F.3d 1092 (9th Cir. 2000). At the most elementary level, due process requires that cases be decided upon the evidence presented with the alien given "a full and fair hearing." *Cuadras v. INS*, 910 F.2d 567, 573 (9th Cir. 1990). As *Sarvia-Quintanilla v. INS*, 767 F.2d 1387, 1392 (9th Cir. 1985) summarizes this fundamental requirement, due process "is satisfied only by a full and fair hearing," with each case "evaluated on its own merits to determine whether the alien's factual support and concrete evidence are sufficient."

Here, as outlined above, the initial voluntary departure order, agreed to by their ineffective attorney, cut off the Court's ability to review the evidence presented during Mr. and Mrs. Hot's removal proceedings. Because Mr. Shulman coerced them into accepting the order, and withdrew their previously submitted asylum applications (notably, submitted by the attorney they had chosen to represent them before the Court), they never received a full and fair hearing on their applications for asylum.

Pursuant to 8 U.S.C. §1362, aliens in removal proceedings have a statutory right to be represented by counsel at their own expense. This right is "an integral part of the procedural due process to which the alien is entitled." *Batanic v. INS*, 12 F.3d 662, 667 (7th Cir. 1993) (internal quotations omitted); *Castro-O'Ryan v. U.S. Dep't of Immigration and Naturalization*, 821 F.2d 1415, 1419 (9th Cir. 1987). The necessity of protecting aliens, often unfamiliar with the American adversarial process, from potential injustice, has been recognized by the various circuits as deserving of this Fifth Amendment due process protection. *Borges*, 402 F.3d at 408; *Lu v. Ashcroft*, 259 F.3d 127, 131 (3d Cir. 2001); *Aris v. Mukasey*, 517 F.3d 595 (2d Cir. 2008); *U.S. v. Campos-Asencio*, 822 F.2d 506, 509 (5th Cir. 1987); *Shahandeh-Pey v. INS*, 831 F.2d 1384, 1389 (7th Cir. 1987); *Magallanes-Damian v. INS*, 783 F.2d 931, 933 (9th Cir. 1986); *Janvier v. U.S.*, 659 F. Supp. 827, 829 (N.D.N.Y. 1987).

The Supreme Court articulated a clear standard for judging ineffectiveness of counsel in *Strickland v. Washington*, 466 U.S. 669, 687 (1984). Under *Strickland*, defective assistance is subject to a two-part test. First, the defendant must show that counsel's performance was deficient by "identify[ing] the acts or omissions of counsel that [were not] the result of reasonable professional judgment." *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. Both of these requirements were met in this case. Within the contours of this standard, attorneys are permitted to exercise professional discretion. The *Strickland* test is applied with the "presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689 (citation omitted). This presumption is applied in order to protect the autonomy of practicing attorneys, and takes into account the ease of judging an attorney's performance with the knowledge of hindsight. Thus, properly limiting the application of the test, the Strickland Court found that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.* at 688.

The standards set forth in *Strickland* have been applied to counsel for aliens in deportation and exclusion proceedings. The Court in *Shahandeh-Pey*, 831 F.2d at 1389, for example, held that "[u]nder the correct standard, an alien must 'produce some concrete evidence indicating that the violation of a

procedural protection actually had the potential for affecting the outcome of . . . deportation proceedings.'" *Id.* at 1389 (*citing*, *U.S. v. Cerda-Pena*, 799 F.2d 1374, 1379 (9th Cir. 1986)). Also applying the *Strickland* test, the United States District Court for the Northern District of New York found an alien's attorney's failure to file a motion for a recommendation against deportation to be ineffective assistance of counsel. *Janvier*, 659 F. Supp. at 829. The Court determined that this failure was not a strategic choice, but rather simple ignorance of the law. "Such a failure to investigate the applicable law of a case cannot be considered adequate under prevailing norms of professional competency." *Id.* at 829. The Court was appalled by the possibility that the attorney had possibly "given his client a professional opinion directly contrary to law." *Id.* at 829.

It is clear that the Petitioners here met the requirements set forth in *Strickland*, 466 U.S. at 689, and established that they suffered ineffective assistance of counsel. In this case, competent counsel representing Mr. and Mrs. Hot before the IJ, would have explained the meaning and significance of accepting a voluntary departure order, and would not have advised their clients that accepting such an order was their "only option" when they had a bonafide application for asylum pending before the IJ. *See Rranci*, 540 F.3d at 165. Competent counsel also would have explained the significance of withdrawing the application for asylum. As explained in Mr. Hot's

declaration submitted in support of the motion to reopen, Petitioners were told by Mr. Shulman, that if they did not accept an order of voluntary departure, they would be arrested, detained and removed from the country. In contrast to what is found by the IJ in his decision, and upheld by the BIA, this is clearly a "false representation," and warranted reopening.[2] *Borges*, 402 F.3d at 406. Relying on what they thought was competent legal counsel, and believing they would immediately be arrested and deported if they did not comply with their attorney's advice, Mr. and Mrs. Hot conceded to their attorney's decision to accept the order of voluntary departure. Their ineffective attorney essentially stripped away their ability to have the Court consider their application for asylum.

The Petitioners were prejudiced by the conduct of Mr. Shulman, in improperly advising his clients as to their rights as aliens in removal proceedings. Essentially, Mr. and Mrs. Hot were deprived of the opportunity to have their applications for asylum heard by the Court. Notably, and as explained below, their asylum applications, as amended by prior

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[2] Contrary to Mr. Shulman's incorrect advice, the petitioners would have had an immediate right to appeal the IJ's Order to the BIA, without any possibility of being arrested. If the appeal to the BIA was unsuccessful, the Petitioners would have had the right to appeal that decision to the Third Circuit Court of Appeals, again with no possibility of arrest. Mr. Shulman's advice was not only false and misleading, it was coercive.

attorney Andrew Bayne, were submitted to the IJ on or about April 26, 1996, and were a part of the record of proceedings below. This statement was ignored by the Third Circuit in their denial. App. 6.

Given the circumstances, and in contrast to what is held by the BIA and Third Circuit, the Petitioners did demonstrate due diligence. In the years following their final hearing, Mr. and Mrs. Hot sought legal advice from several attorneys, beginning with an attorney who attempted to extend their voluntary departure, evidence of which was attached to the Motion to Reopen. The next attorney attempted to obtain their file through a Freedom of Immigration Act ("FOIA") request, however, due to an asbestos removal project by the government, the request was delayed. Evidence of that was also attached to the Motion to Reopen. They were thereafter told numerous times over the next several years that nothing could be done for them. Their fear of returning to the former Yugoslavia, financial difficulties, and the serious health problems of Valjbona Hot, made it impossible for the couple to seek more competent counsel. Evidence of Mrs. Hot's illness was also attached to the Motion. As the Petitioners adequately explained why they did not file a motion to reopen at an earlier date, and did file as soon as they understood the full gravity of the actions of their first attorney, they clearly acted with due diligence and the equitable tolling of the deadline for moving to reopen was warranted. *Mahmood v. Gonzales*, 427 F.3d 248, 252 (3d Cir. 2005) (finding alien lacked due diligence

when there were *unexplained* periods of delay in checking on status of removal proceedings). Here, unlike in *Mahmood*, and in contrast to what was found by the BIA, there are no unexplained periods of delay. Mr. and Mrs. Hot were again victims of ineffective assistance of counsel when they retained Mr. Vladislav S. Sirota, Esq. to represent them. It was not until the point of retaining the firm of DiRaimondo & Masi, LLP, that they understood that their asylum application had been withdrawn.

The Petitioners here will continue to be prejudiced by their prior counsel's actions until their proceedings are reopened, so that they may pursue their applications for relief. It is clear that the filing of the motion to reopen before the Immigration Court, and subsequent appeals to the BIA and Third Circuit was the only manner in which the Petitioners could attempt to rectify their situation, as created by their ineffective attorneys. Having established actual prejudice, due diligence, and proof of compliance with all of the *Lozada* requirements, Petitioners' Motion to Reopen should have been granted. An alien's due process right to competent counsel is violated if he is not given a means in which to challenge the violation of that right. The conflict between that due process right cannot be rectified with the Third Circuit's precedent regarding motions to reopen as it now stands. Because the underlying basis of Petitioners' motion is ineffective assistance of counsel, and

Petitioners' rights to due process were violated, the instant writ should be granted.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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IMG-155 **NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-3229

SALIH HOT; VALJBONA HOT,

Petitioners

v.

ATTORNEY GENERAL OF THE UNITED STATES,

Respondent

On Petition for Review of an Order of the
Board of Immigration Appeals
(Agency Nos. A72 019 096 and A72 019 097)
Immigration Judge: Honorable Frederic Leeds

Submitted Pursuant to Third Circuit LAR 34.1(a)
April 7, 2010

Before: RENDELL, FISHER and GARTH,
Circuit Judges.

(Filed April 12, 2010)

OPINION

PER CURIAM

Salih Hot and his wife Valjbona Hot petition for review of a Board of Immigration Appeals ("BIA") decision dismissing their appeal of an Immigration Judge's ("IJ") decision denying their second motion to reopen their immigration proceedings. We will deny the petition for review.

The Hots are natives and citizens of the former Yugoslavia. They came to the United States in 1991. Shortly thereafter, Salih Hot filed an asylum application claiming that he and his wife feared persecution by Serbians on account of their Albanian ethnicity and Muslim religion. In 1995, the Immigration and Naturalization Service issued orders to show cause charging that the Hots were subject to deportation because they entered the United States without inspection. Through counsel, the Hots filed amended asylum applications and conceded their deportability. The Hots then withdrew their asylum applications and requested voluntary departure, which was granted in 1996.

The Hots, however, did not depart the United States and U.S. Immigration and Customs Enforcement detained Salih Hot in 2007. Valjbona Hot was placed under an order of supervision. The Hots then moved to reopen their proceedings claiming ineffective assistance of their former counsel and changed country conditions. The IJ denied the motion, concluding that the motion was untimely and that tolling of the filing deadline was not warranted. The IJ

stated that the Hots had submitted no evidence in support of their motion and that it was unclear what kept them from seeking to reopen the proceedings over the last decade. The IJ also noted that the Hots had failed to comply with the procedural requirements of *Matter of Lozada*, 19 I. & N. Dec. 637 (BIA 1988), applicable to an ineffective assistance of counsel claim. The Hots did not appeal the IJ's order.

The Hots then filed a second motion to reopen the proceedings claiming ineffective assistance of the lawyer they had retained in 1996 and the lawyer who had filed their first motion to reopen. The Hots asserted that in 1996 their lawyer falsely told them that, if they did not accept voluntary departure, they would be detained and deported. They stated that soon after the hearing they sought help from several other attorneys. One attorney unsuccessfully tried to extend the voluntary departure period; another filed a Freedom of Information Act Request on their behalf. The lawyers told them "nothing could be done for [them]." A.R. at 67. The Hots further stated that Valjbona Hot suffered from serious health problems in 2000 and was diagnosed with Bell's Palsy. They stated that her health problems and their financial difficulties precluded them from seeking other counsel.

The IJ again found the motion untimely and decided that tolling the filing deadline was not warranted. The IJ stated that the Hots did not act with due diligence, noting that it was still unclear what fraud kept them from filing a motion to reopen within

the past decade. The IJ also stated that they had submitted no new evidence supporting a claim of asylum or evidence of changed country conditions that would excuse compliance with the filing deadline. The IJ also denied the motion based on a failure to make out a prima facie claim for relief and submit an application for relief. Finally, the IJ declined to exercise his discretion and reopen the proceedings.

On appeal, the BIA rejected the Hots' argument that the IJ erred in finding that they did not act with due diligence. The Hots argued they did not understand that their asylum applications had been withdrawn until 2007. The BIA found this contention unsupported by the record and inconsistent with their claim that they had consulted several attorneys who told them over the next several years that nothing could be done. The BIA also found that due diligence was not established for the eleven year period at issue. The BIA recognized Valjbona Hot's illness in 2000 but stated that the evidence did not explain the subsequent delay of over seven years in filing the first motion to reopen. The BIA also agreed with the IJ that the Hots failed to establish their eligibility for relief and submit the requisite application. This petition for review followed.

We review the denial of a motion to reopen for abuse of discretion and review the BIA's underlying factual conclusions related to the motion for substantial evidence. *Caushi v. Attorney General,* 436 F.3d 220, 225-26 (3d Cir. 2006). The BIA's denial of a

motion to reopen may only be reversed if it is arbitrary, irrational, or contrary to law. *Id.*

The Hots argue in their brief that the BIA erred in dismissing their appeal where they satisfied the procedural requirements of *Lozada* and established the ineffective assistance of their former counsel. The Hots recognize the BIA's finding that they failed to show due diligence, but they argue that they explained how their attorneys prevented them from pursuing their case and why they were unable to file their motion earlier. They state that their attorney led them to believe that accepting voluntary departure was their only option and that they consulted with other attorneys after the voluntary departure order was issued. The Hots contend that Valjbona's health issues exacerbated their inability to seek competent counsel and attempt to legalize their status. They state that they filed their motion at the earliest date following their discovery of ineffective assistance of counsel.

As recognized by the BIA, ineffective assistance of counsel may serve as a basis for equitable tolling of the filing deadline for a motion to reopen, but an alien must establish that he exercised due diligence. *Mahmood v. Gonzales*, 427 F.3d 248, 251-52 (3d Cir. 2005). Although the Hots believed they had no other option but to seek voluntary departure, they were aware of the result of the 1996 proceedings and consulted with several attorneys after those proceedings concluded. Even if we assume that the Hots acted

with due diligence at this time, we agree with the BIA that the Hots did not establish that they exercised due diligence throughout the eleven-year period before they filed their first motion to reopen. *See id.* at 253 (holding tolling not warranted where "periods of unaccounted-for delay reveal[ed] a lack of diligence"). The record reflects that Valjbona Hot became ill in 2000, but, as noted by the BIA, the Hots did not explain how her illness prevented them from pursuing their claim for the next seven years. The Hots have not shown that the BIA abused its discretion in denying their second motion to reopen based on a lack of due diligence.[1]

The Hots also argue that their rights to due process were violated as a result of the failure of the IJ and BIA to consider all of the evidence supporting their ineffective assistance of counsel claims. The Hots, however, do not have a cognizable due process claim because there is no liberty interest at stake in a motion to reopen immigration proceedings, a discretionary form of relief. *Altamirano-Lopez v. Gonzales*, 435 F.3d 547, 550-51 (5th Cir. 2006). *See also United States v. Torres*, 383 F.3d 92, 104-05 (3d Cir. 2004)

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[1] Based on this conclusion, it is unnecessary to address the BIA's statement that the Hots also failed to establish their eligibility for relief and submit the requisite application. The Hots do not challenge the BIA's decision in this regard in their brief.

(holding aliens do not have a due process interest in being considered for discretionary relief).

Accordingly, we will deny the petition for review.

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

Files: A072 019 096 – Newark, NJ Date: JUL 20 2009
A072 019 097

In re: SALIH HOT
VALJBONA HOT

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENTS:
Michael P. DiRaimondo, Esquire

APPLICATION: Reopening

The respondents appeal from the January 15, 2008, decision of the Immigration Judge denying their second motion to reopen.[1] The appeal will be dismissed.

At his July 31, 1996, hearing before the Immigration Judge, the respondent withdrew his application for asylum and accepted a period of voluntary departure. Over 11 years later, on September 25, 2007, he filed his first motion to reopen, claiming ineffective assistance of prior counsel. That motion

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[1] The respondents are family members. All references herein to "the respondent" refer to the male respondent, who is the lead respondent in these proceedings, unless otherwise specified.

was denied by the Immigration Judge on October 12, 2007. A second motion to reopen was filed on December 6, 2007, alleging ineffective assistance of counsel against both the attorney representing the respondent at his July 31, 1996, hearing, and his subsequent counsel who filed the first motion to reopen. In denying the second motion, the Immigration Judge found the motion to be untimely, and refused to apply equitable tolling, as the respondent had not established due diligence for the entire 11 year period in question (I.J. at 3-4). He further denied the second motion for failure to make out a *prima facie* claim for relief, noting that the motion was not accompanied by an application for the requested relief as required by 8 C.F.R. § 1003.23(b)(3), and further failed to sufficiently establish eligibility for such relief (I.J. at 4). The respondent challenges these conclusions on appeal.

We may review questions of law, discretion, judgment, and all other non-fact issues in appeals from decisions of immigration judges *de novo*. 8 C.F.R. § 1003.1(d)(3)(ii); *Matter of A-S-B-*, 24 I&N Dec. 493, 497 (BIA 2008). We find the respondent's argument that the Immigration Judge erred in failing to find due diligence unpersuasive. We initially find the contention that the respondent did not understand that his asylum application had been withdrawn until 2007 is not supported by the record, and is inconsistent with his claim to have consulted "several attorneys" who told him "numerous times over the next

several years that nothing could be done. . . ." Respondent's Appeal Brief at 7-8.

Although ineffective assistance of counsel may serve as a basis for equitable tolling of the filing deadline for a motion to reopen, a respondent must establish that he or she exercised due diligence during the time period sought to be tolled. *Mahmood v. Gonzales*, 427 F.3d 248, 252 (3d Cir. 2005). We do not find that due diligence has been established for the 11 year period in question. In his appeal brief, the respondent mentions "fear of returning to the former Yugoslavia, financial difficulties, and the serious health problems" of his wife as factors which "made it impossible for the couple to seek more competent counsel."[2] Respondent's Appeal Brief at 7-8. While he references evidence of his wife's illness that was filed with his motion, we note that such evidence consisted of a hospital bill for care received by the wife in April 2000. Such document fails to explain the subsequent delay of over 7 years in filing the first motion to reopen. No further explanation or evidence was provided regarding the other two factors.

We also concur with the Immigration Judge's determination that the motion failed to establish the respondent's eligibility for the reliefs sought, and was not accompanied by an application for such relief as

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[2] Although such statement seems to question the competence of the several attorneys he consulted, the respondent makes no claim of ineffective assistance against them.

required by regulation.[3] The respondent has failed to meaningfully address this issue on appeal. Under all these circumstances, we find no reason to disturb the Immigration Judge's denial of the respondents' second untimely motion to reopen.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/ Molly Kendall Clark
FOR THE BOARD

[3] The Immigration Judge's reference to the relief of cancellation of removal under section 240A(b) of the Act, 8 U.S.C. § 1229b(b) (I.J. at 4), was in error, as the present case involves deportation, and not removal, proceedings. Nevertheless, the respondents are ineligible for suspension of deportation under former section 244(a) of the Act, 8 U.S.C. § 1254(a), as they failed to accrue the requisite 7 years of continuous physical presence prior to being served with the Orders to Show Cause. See section 309(c)(5) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which applies section 240A(d)(1) to transitional suspension cases instituted before IIRIRA's enactment date.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
NEWARK, NEW JERSEY

File Nos.: A 72-019-096 A 72-019-097	In Deportation Proceedings
In the Matter of: Salih HOT, Valjbona HOT, Respondents.	**ORDER ON MOTION TO REOPEN** (Filed Jan. 22, 2008)

ON BEHALF OF RESPONDENTS

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ON BEHALF OF DHS

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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. Facts and Procedural History

Salih Hot and Valjbona Hot ("Respondents") are natives and citizens of former Yugoslavia and entered the United States ("U.S.") on or about March 4, 1991

without first being inspected by an immigration official. Respondents filed an application for asylum on or around September 23, 1991 with the Immigration and Naturalization Service ("INS"). Subsequently, their asylum applications were referred to the Immigration Court for proceedings and an Order to Show Cause ("OSC") was issued to Respondents on December 14, 1995 charging them as being subject to deportation under former Immigration and Nationality Act ("INA") § 241(a)(1)(B) as having entered the U.S. without inspection.

Respondents appeared before the Immigration Judge ("IJ") on April 4, 1996, represented by former counsel Mr. Andrew Bayne, where they conceded to deportability as charged in their respective OSC and requested an individual hearing to apply for asylum and withholding of deportation from Yugoslavia and Montenegro.

At their subsequent immigration hearing on July 31, 1996, the Respondents, through former counsel Mr. Edward Shulman ("Mr. Shulman"), stipulated with the INS trial attorney to withdraw their applications for asylum and withholding of deportation and accepted 180-day voluntary departure. Respondents declared Australia as the country of deportation in the event they failed to voluntarily depart, with Yugoslavia/Montenegro designated as the country of deportation if Australia does not accept them.

Respondents never departed the U.S. and eventually the lead respondent was detained by Immigration and Customs Enforcement. On September 25, 2007, Respondents filed a motion to reopen, through former counsel Mr. Vladislav Sirota ("Mr. Sirota") in which Respondents alleged Mr. Shulman's conduct amounted to ineffective assistance of counsel. This motion was denied on October 12, 2007 for being filed untimely without an applicable exception to the filing deadline. Additionally, the motion was denied for failing to follow the requirements outlined in *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) which was subsequently adopted by the Third Circuit. *See, e.g., Zheng v. Gonzales*, 422 F.3d 98, 106 (3rd Cir. 2005).

On December 6, 2007, Respondent's filed a second motion to reopen through attorney Michael P. DiRaimondo in which they allege, in addition to reasserting the same argument from the prior motion to reopen, that Mr. Sirota's representation also amounted to ineffective assistance of counsel. The Department of Homeland Security file a motion in opposition on January 9, 2008.

II. Standard for Motion to Reopen

Motions to reopen immigration proceedings have been historically disfavored. *See INS v. Abudu*, 485 U.S. 94, 107 (1988); *Zheng v. Gonzales*, 422 F.3d 98, 106 (3rd Cir. 2005). The movant, therefore, bears a "heavy burden" in seeking a reopening of deportation proceedings. *Matter of Coelho*, 20 I&N Dec. 464, 473

(BIA 1992). The motion must state new facts that will be proven at a hearing if the motion is granted, and it must be supported by affidavits and other evidentiary material. *See* INA § 240(c)(7)(B); 8 C.F.R. § 1003.23(b)(3). A motion to reopen will not be granted unless the IJ is satisfied that the evidence offered is material and was not available and could not have been discovered or presented at the former hearing. *See* 8 C.F.R. § 1003.23(b)(3).

Ineffective assistance of counsel is a ground on which a respondent may base a motion to reopen. *See Zheng*, 422 F.3d at 106. The BIA has established a three-prong test which a respondent must satisfy to base a motion to reopen on ineffective assistance of counsel. *Id.* (citing *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988)). First, the alien's motion must be supported by an "affidavit of the allegedly aggrieved [alien] attesting to the relevant facts"; secondly, "former counsel must be informed of the allegations and allowed the opportunity to respond," and this response should be submitted with the motion; and finally, "if it is asserted that prior counsel's handling of the case involved a violation of ethical or legal responsibilities, the motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not." *Id.* (quoting *Lozada*, 19 I&N Dec. at 639).

The Third Circuit has not adopted a strict formulaic interpretation of *Lozada*; though a respondent

is expected to show evidence of due diligence in complying with *Lozada*. *See e.g.*, *Xu Yong Lu v. Ashcroft*, 259 F.3d 127, 133, 134 (3d Cir. 2001) (finding respondent failed to satisfy his burden where he had neither set forth the relevant facts in sufficient detail nor filed a disciplinary complaint); *c.f. Zheng v. Gonzales*, 422 F.3d 98 (3rd Cir. 2005) (finding respondent satisfied his burden even though he did not file a disciplinary complaint).

III. Discussion

The Court will deny Respondent's motion. Respondent's motion continues to be untimely filed. The order granting Respondent voluntary departure was immediately vacated and the alternate order of deportation to Australia or, in the alternative, to Yugoslavia/Montenegro became final when Respondents failed to depart the U.S. by March 31, 1997. Respondents did not file the current motion to reopen until well past the 90-day deadline. *See* 8 C.F.R. § 1003.23(b)(1) (2007).

The Court also funds that Respondents do not merit a tolling of this deadline. The Court may toll this deadline under certain circumstances. First, the deadline does not apply if the respondent asserts an asylum or withholding of deportation claim if such evidence is material and was not available and could not have been discovered or presented at the previous proceeding. *See* 8 C.F.R. § 1003.23(b)(4)(i). Respondents' did not put forth any evidence, or even state a

reason in their affidavits, of why they feel they would be persecuted if they would be returned to the former Yugoslavia. Respondents' deadline to file a motion to reopen should not be extended based on their claim to changed country conditions due to the lack of supportive documentary evidence. *See* 8 C.F.R. § 1003.23(b)(3).

Second, the deadline may be tolled based on ineffective assistance if an attorney's representation rises to the level of fraud and the respondent shows that he was duly diligent in his attempts to "investigat[e] and bring[] the claim." *Borges v. Gonzales*, 402 F.3d 398, 406 (3d Cir. 2005) (quoting parenthetically *Robinson v. Johnson*, 313 F.3d 128, 142 (3d Cir. 2002); *see also Mahmood v. Gonzales*, 427 F.3d 248, 252 (3d Cir. 2005) (extending the toll from *in absentia* claims involving a 180-day deadline to ineffective assistance of counsel claims involving a 90-day deadline). Notably, "'[e]quitable tolling is an extraordinary remedy which should be extended only sparingly.'" *Mahmood*, 427 F.3d at 252 (quoting *Hedges v. United States*, 404 F.3d 744, 751 (3d Cir. 2005)). As this Court stated in its denial of Respondents' first motion, it is unclear what fraud was involved which kept Respondents from filing a motion to reopen within the past decade.[1] *See Borges*, 402 F.3d at 407.

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[1] In *Borges*, the Third Circuit defined fraud as "false representations of a material fact made with knowledge of their falsity and with intent to deceive the other party" and that "the

(Continued on following page)

The Court also denies Respondents' motion to reopen for failure to make out a *prima facie* claim to relief. *See Matter of Coelho*, 20 I&N Dec. 464, 472 (BIA 1992) (citing *I.N.S. v. Doherty*, 502 U.S. 314, 321-22 (1992) and holding that an alien's failure to establish a *prima facie* case for the relief sought is one of three independent grounds upon which a motion to reopen may be denied); *see also* 8 C.F.R. § 1003.23(b)(1). The regulations specifically state that "[a]ny motion to reopen for the purpose of acting on an application for relief *must be accompanied by the appropriate application for relief* and all supporting documents." 8 C.F.R. § 1003.23(b)(3) (emphasis added). The BIA has found that it is a "procedural failure" for a movant to not submit the appropriate application for relief and will typically result in a denial of the motion to reopen. *See In re Yewondwosen*, 21 I&N Dec. 1025, 1026 (BIA 1997) (finding that "the primary purpose of the application form is to establish *prima facie* eligibility for such relief").

Respondents' motion fails to follow 8 C.F.R. § 1003.23(b)(3) in two regards: the motion is not accompanied by an application for asylum or for cancellation of removal, and the evidentiary material submitted does not sufficiently show that Respondents even qualify for asylum under INA § 208 or cancellation of removal under INA § 240A(b). In fact,

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representation must be believed and acted upon by the party deceived to his disadvantage." 402 F.3d at 407.

based on the facts as presented by Respondents, their eligibility for cancellation of removal would be pretermitted by the "stop-time rule" of INA § 240A(d)(1), which terminates the accrual of continuous physical presence upon the service of a charging document. *See Matter of Cisneros-Gonzalez*, 23 I&N Dec. 668, 670 (BIA 2004). Inasmuch as Respondents entered the U.S. on March 4, 1991 and were served the OSC on December 14, 1995, they accrued approximately four years and nine months of continuous physical presence. Ten years of continuous physical presence are required under INA § 240A(b)(1)(A) to be eligible for cancellation of removal.

IV. Conclusion

The Court acknowledges Respondents well-respected reputation in their community evidenced by the touching letters written to the Court by their three United States citizen children and the resolved support of their friends and neighbors who signed a petition on their behalf; be that as it may, Respondents have not satisfied the regulatory requirements to have their motion to reopen be granted, nor have they convinced the Court to exercise its discretion to reopen immigration proceedings which concluded over a decade ago after failing to voluntarily depart the U.S. as they had promised.

ORDER

Accordingly, **IT IS HEREBY ORDERED** that Respondents' motion to reopen is **DENIED**;

IT IS FURTHER ORDERED that Respondents' motion for a stay of deportation is **DENIED**.

January 15, 2008 /s/ Frederic G. Leeds
Frederic G. Leeds
Immigration Judge

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Office of the Immigration Judge

In the Matter of:	Case No.: A 72 019 096
SALIH HOT	Docket:
RESPONDENT	IN DEPORTATION PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on July 31, 1996. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed, the Oral Decision will become the official decision in this matter.

☐ The respondent was ordered deported to _____
_____.

☐ Respondent's application for voluntary departure was denied and respondent was ordered deported to _____
or in the alternative to _____.

☒ Respondent's application for voluntary departure was granted until MARCH 31, 1997, with an alternate order of deportation to AUSTRALIA or YUGOSLAVIA/MONTENEGRO.

☒ Respondent's application for asylum was ( ) granted ( ) denied (X) withdrawn ( ) other.

☒ Respondent's application for withholding of deportation was ( ) granted ( ) denied (X) withdrawn ( ) other.

☐ Respondent's application for suspension of deportation was ( ) granted ( ) denied ( ) withdrawn ( ) other.

☐ Respondent's application for waiver under Section _____ of the Immigration and Nationality Act was ( ) granted ( ) denied ( ) withdrawn ( ) other.

☐ Respondent's application for _____ was ( ) granted ( ) denied ( ) withdrawn ( ) other.

☐ Proceedings were terminated.

☐ The application for adjustment of status under Section (216) (216A) (245) (249) was ( ) granted ( ) denied ( ) withdrawn ( ) other. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

☐ Respondent's status was rescinded under Section 246.

☐ Other _____

☒ Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

/s/ Daniel Meisner
Immigration Judge

Date: July 31, 1996

Appeal: RESERVED / [WAIVED] (A / I / [B])